APPEAL NO. 93325

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On March 26, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be resolved at the CCH were: (1) whether claimant was injured in the course and scope of her employment on (date of injury); and, (2) whether claimant notified employer of her injury not later than 30 days after (date of injury). The hearing officer determined that the appellant, claimant herein, did not sustain an injury in the course and scope of her employment on (date of injury), and that she did not report an injury to the employer within 30 days of (date of injury).

Claimant was not satisfied with the hearing officer's decision and requests a review reasserting that she was injured as alleged and reported the injury. Respondent, carrier herein, responds alleging certain procedural errors, untimely filing by the claimant and in the alternative responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

First addressing some procedural points, carrier alleges that claimant's appeal does not "comply with Chapter 143.1 *et. seq*. of the Texas Workers' Compensation Rules." We have previously held in Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992, that, in a case such as this, the claimant's request for review meets the minimum requirements of the statute (Article 8308-6.41(b)) and Commission rules (Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE § 143.3(a)). We understand the thrust of claimant's appeal to be one of sufficiency of the evidence and do not find that the carrier has been misled or prejudiced as to the argument presented by claimant. Carrier's point is denied as not being meritorious.

Carrier's second point is that the claimant's appeal is untimely. We fail to exactly understand carrier's contention, which is apparently that the appeal must be filed within 15 days of the date the hearing officer signed the decision. We point out that the statute (Article 8308-6.41(a)) requires the appeal be filed within 15 days "after the date on which the decision of the hearing officer is <u>received</u> from the division of hearings. . . ." (emphasis added). The decision of the hearing officer was distributed, by mail, on April 14, 1993. Although not clear when it was received by the claimant, claimant's appeal was filed on April 23, 1993 (pursuant to Rule 143.3(c)(1)) and as such was clearly timely filed. Carrier's point is without merit.

As to the merits of the case, claimant testified through an interpreter, that she was employed as a sewing machine operator by (employer) on (date of injury), when she felt a pain in her back as she lifted a bundle of t-shirt material from a drawer to her sewing table.

Claimant testified she reported the injury within about 20 minutes to her supervisor, (Ms. S). Ms. S allegedly told claimant "[w]ell, just be careful." Claimant testified that she continued to work in pain until finally, on April 8, 1992, claimant saw (Dr. B), a chiropractor, who told her she had a "twisted spine." Claimant states she returned to work on April 10th with a doctor's excuse. Claimant states Ms. S did not do anything for her and told claimant that she would have to "increase productivity" or she would be laid off. Claimant testified she could not "increase productivity" because of her pain and claimant was subsequently laid off because her production had not improved. Claimant states she next saw (Dr. P), a chiropractor, on May 22nd.

Claimant's TWCC-41 (Notice of Injury) shows a date of injury of "12-31-91." Claimant stated she put December 31, 1991 on her claim, which was filed on May 4, 1992, because she could not remember the exact date of her injury, but that later "she remembered it better." Claimant conceded she had suffered from arthritis for about eight years. Both Ms. S and L) a "trainer" for the employer who "walked" the area, stated that claimant had complained of pain in her arms and legs due to the arthritis. Both denied any knowledge of any injury by claimant and that claimant had never reported an injury to them.

Claimant introduced a medical report, dated February 18, 1993 from Dr. P, which showed claimant to have a cervical, thoracic and lumbar sprain/strain. The medical history was that claimant ". . .stated that these symptoms (neck and back pain) began after an injury on December 31, 1991. . . . (when she) injured back while lifting bundles of clothes."

The hearing officer found claimant did not injure her back at work on (date of injury) and did not report an injury on (date of injury) or within 30 days of (date of injury). Claimant alleges that she was injured as she stated at the CCH and did report it to Ms. S as alleged.

Claimant stated at the CCH that an accident does not have to be witnessed. We agree, however, we point out that the testimony of the claimant alone, as an interested party, only raises an issue of fact for the hearing officer, who is the trier of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The hearing officer may believe all, part or none of the testimony of any witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). The hearing officer in this case apparently did not believe the claimant's testimony of the circumstances of how she injured her back. In reviewing a case, we will reverse the hearing officer, based on insufficiency of the evidence, only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.);

In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find.

The hearing officer's Decision and Order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge